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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-15015

In the Matter of

MICHAEL BRESNER, RALPH CALABRO, JASON KONNER, and DMITRIOS KOUTSOUBOS

RESPONDENT RALPH CALABRO'S PREHEARING BRIEF

COUSINS CHIPMAN & BROWN, LLP
80 Lexington Avenue
17th Floor
New York, New York 10168
cole@ccbllp.com
Tel: (212) 551-1152
Fax: (302) 295-0199

Counsel for Respondent Ralph Calabro

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Respondent Ralph Calabro ("Calabro") respectfully submits this Prehearing Brief pursuant to the Order Amending Prehearing Schedule, dated November 15, 2012. As will be demonstrated at trial, the charges alleged against Mr. Calabro by the Division of Enforcement (the "Division") in the Order Instituting Proceedings, dated September 10, 2012 (the "OIP"), are without merit. Accordingly, the questions set forth in Section III of the OIP should each be answered in the negative.

INTRODUCTION AND FACTUAL BACKGROUND

Ralph Christopher Calabro was a broker and branch manager in the Parlin, New Jersey branch of J.P. Turner & Co. ("J.P. Turner") for approximately seven years, from March 2004 through February 2011. In that position (and currently), Mr. Calabro took his job seriously. He was (and still is) extremely diligent in conducting extensive research relating to the investments he recommended to his customers, both from a company, sector, and market-wide viewpoint; he was (and still is) extremely diligent in communicating with his customers to make sure they were fully aware of the risks of their investments, the status of their accounts, and the reasons for any trade he recommended; and he has been hailed by his supervisors as having had a true belief in, and an unbelievable handle on, the investments and strategies he recommended, and that those investments and strategies were viewed by them, after a close review, as solid and sound.

Beginning in late 2007, Mr. Calabro's research led him to believe what millions of economists, bankers, brokers, investors, and government officials failed to detect. Mr. Calabro concluded that the bubble economy and market of 2007 would not only falter, it was heading into a tailspin, and as it turns out, he was right. The year 2008 brought with it a 7,000 point market crash of epic proportions. It saw the Great Recession, the failure of the entire banking system, of insurance companies, of automobile companies and others (all of which required huge injections of government funding), and the demise of both Bear Stearns and Lehman – two old line and hallowed Wall Street investment firms.

To enable his customers to take full advantage of his belief that the markets would crash in 2008, Mr. Calabro came up initially with a "short" strategy, which ultimately developed, due to market conditions and restrictions, into an options strategy. Mr. Calabro recommended selling shares of companies in sectors that his research disclosed would drop the most, including the banking sector. Shorting and options strategies of this nature are, indeed, risky, and (certainly when profitable) are known to have a significantly greater volume of account trading activity than a typical buy-and-hold strategy (*i.e.*, the strategy that decimated untold numbers of brokerage and retirement accounts during the market crash Mr. Calabro correctly predicted). It is for this very reason that Mr. Calabro explained, and disclosed the risks of, his strategy in detail to every customer, and it is for this very reason Mr. Calabro and J.P. Turner required customers who decided to follow the strategy to confirm repeatedly, and in writing, that they were aware of its high degree of risk and potential volatility, that options trading by nature was short-term, and that overall commissions and costs in active accounts tended to be greater than in a typical buy-and-hold account. Stated simply, Mr. Calabro's strategy, and its risks, was entirely transparent, was designed to generate short-term profits for his customers (assuming he was correct on the market), and certainly was not designed for the purpose of generating commissions without regard for his customer's interests. Mr. Calabro's strategy was high risk, but it was also honest.

As Mr. Calabro predicted, the market crashed in 2008, and his short and options strategies generated sizeable short-term profits for his customers. At that point Mr. Calabro was very busy because his practice was to explain each recommended trade to each customer, and given the generally higher trading activity inherent in the strategy, Mr. Calabro found himself constantly calling his customers – sometimes twice and three times in any given week. As was expected and fully disclosed and agreed in writing, the total dollar amount of commissions generated in the accounts engaged in his options strategy were higher than in typical buy-and-hold accounts. Given the activity, in 2008, Mr. Calabro's direct and indirect supervisors closely studied, reviewed, and understood his strategy, spoke to certain of his customers, and because the strategy was generating higher commissions than in a typical account, decided upon reduced and restricted commissions for Mr. Calabro's customers. In fact, approximately 85% of commissions in those accounts were generated when his customers' accounts were up by approximately 65% on the moneys invested in Mr. Calabro's strategies.

Mr. Calabro, unfortunately, did not predict the events of March 2009, that notwithstanding reports indicating that the largest banks in the United States and overseas were at continued great risk of failure despite having received hundreds of billions in bailout moneys, and the stock of Citigroup, Inc. was at points trading at less than one dollar per share, the same banks reported that they were once again profitable. The reports caused a rise in the markets, which ran contrary to Mr. Calabro's strategy, and thus began the decline of many of his customer accounts. Although Mr. Calabro believed the spike was temporary, and the real bottom of the market would be even lower, he turned out to be incorrect in this regard, and the accounts that had been so successful previously, declined. The commissions generated by J.P. Turner and Mr. Calabro also declined.

MR. CALABRO IS CHARGED WITH FRAUD

Beginning in 2010, the Division initiated an investigation into certain trading and supervisory practices at J.P. Turner, which ultimately included seeking information concerning brokers whose accounts were actively traded. Mr. Calabro was among the brokers reviewed, and his customers were contacted by the Division. Although the Division staff contacted many of, if not most of, Mr. Calabro's customers, it appears the Division formally interviewed on-the-record only two who engaged in his short and options strategies, Waldo Willhoft ("Willhoft") and Dudley Williams ("Williams"). The Division obtained documents from a third customer, Harold Moore ("Moore"). Notably, although money was ultimately lost by every customer involved in Mr. Calabro's strategy contacted by the staff concerning the trading in their accounts, not a single customer filed a complaint accusing him of wrongdoing, except Willhoft, Williams, and Moore. They each stand to benefit from this proceeding, as they commenced arbitrations asserting similar claims and seeking damages that overlap with the amounts the Division seeks in disgorgement.

By the OIP dated September 11, 2012, Mr. Calabro has been charged with "churning" the accounts owned by Willhoft, Williams, and Moore. The Division contends that Willhoft, Williams, and Moore were each "generally unsophisticated in securities trading," and each had "conservative investment objectives and low or moderate risk tolerances" with respect to their J.P. Turner accounts that engaged in Mr. Calabro's fully-disclosed, short-term profit, shorting and options trading strategies.[1] (OIP¶¶ 6, 13.) In an attempt to allege churning, the Division further contends that Mr. Calabro "exercised *de facto* control over the accounts," and based upon

[1] The OIP suggests that Willhoft, Williams, and Moore "signed blank or pre-filled account documents that identified inaccurate objectives, risk tolerance, and/or investment experience levels." (OIP ¶ 13.) The allegation is completely unfounded as will be proven during the hearing.

"annualized turnover ratios" (which are inappropriate for judging whether trading was excessive in options trading in the first instance) and "break-even rates of return" (which the accounts clearly surpassed during many of the months in which the market was declining), he "knowingly or recklessly" engaged in excessive trading in those accounts. (OIP ¶¶ 6-8, 13.)

For the reasons set forth below, and as will be demonstrated during the hearing, the Division's charges against Mr. Calabro are unfounded as a matter of both fact and law. Mr. Calabro was, and remains, an honest broker who engaged in a fully-disclosed and transparent options trading strategy appropriate for Willhoft's, Williams', and Moore's repeatedly confirmed investment objectives. The strategy substantially outperformed its overall cost to his customers, as well as most other brokers' accounts, during the Great Recession, but was unfortunately hit by the volatile and unexpected end of that recession and the bull market that followed beginning in March of 2009. This is not fraud.

THE DIVISION'S BURDEN OF PROOF

The Division asserts that Mr. Calabro violated Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act, and SEC Rule 10b-5, all of which, in the context of the Division's charges, preclude similar misconduct. *See United States v. Naftalin*, 441 U.S. 768, 773 n.4 (1979). In a nutshell, the Division must prove that Mr. Calabro engaged in a device, scheme, or artifice to defraud in the purchase or sale of securities. *Id.*; *Thompson v. Smith Barney, Harris Upham & Co.*, 709 F.2d 1413, 1416 n.3 (11th Cir. 1983). The purportedly fraudulent "device" of which Mr. Calabro stands accused, according to the OIP, was "churning" the brokerage accounts of three customers – Willhoft, Williams, and Moore. The uncontested facts, along with the evidence that will be submitted during the hearing, will prove the contrary; Mr. Calabro *did not* commit fraud.

Indeed, a large number of trades in a customer's account that ultimately results in "losses while [the broker] was receiving substantial commissions," standing alone, does not constitute churning. *Hotmar v. Lowell H Listrom & Co., Inc.*, 808 F.2d 1384, 1386 (10th Cir. 1987). Actionable "churning" instead occurs only when a broker buys and sells securities for a customer's account "without regard to *the customer's investment interests*" and "*for the purpose* of generating commissions." *Thompson*, 709 F.2d at 1416 (emphasis added); *see Craighead v. E.F. Hutton & Co., Inc.*, 899 F.2d 485, 489 (6th Cir. 1990) ("'Churning' is a shorthand expression for a type of fraudulent conduct in a broker-customer relationship where the broker 'overtrades' a relying customer's account to generate inflated sales commissions."). Thus, whether a large number of trades constitutes improper churning depends upon the *intent of both the customer and the broker* at the time of the trades, "for there can be no churning claim if the account owner knowingly and intelligently consented to the frequent turnover, nor can there be a churning claim if the broker lacked the intent to defraud or recklessly disregard the account owner's wishes." *Nelson v. Weatherly Sec., Inc.*, 2006 WL 708219, at *3 (S.D.N.Y. Mar. 21, 2006).

The Division, accordingly, has the burden to prove each of three well-recognized elements before it may establish that Mr. Calabro engaged in improper churning amounting to fraud. The Division must prove that (1) the trading in each customer's account was excessive "'in light of his investment objectives,'" (2) Mr. Calabro "'exercised control'" of each account, and (3) Mr. Calabro "'acted with the intent to defraud or with willful and reckless disregard for the investor's interest.'" *Thompson*, 709 F.2d at 1416-17 (quoting *Miley v. Oppenheimer & Co.*, 637 F.2d 318, 324 (5th Cir. 1981)). Or stated another way, the Division must establish that Mr. Calabro's purpose was not to benefit his clients in accordance with their stated objectives, but that he exercised control over their accounts and traded excessively for the purpose of personal gain. For the reasons outlined below, and as will be demonstrated at trial, the Division is unable to meet its burden.

MR. CALABRO DID NOT ENGAGE IN EXCESSIVE TRADING

"The essence of a churning claim is not a particular transaction, it is the aggregation of transactions, allegedly excessive in number, *judged in relation to the plaintiff's investment objectives* and the market conditions at that time." *Baselski v. Paine Webber Jackson & Curtis Inc.*, 514 F. Supp. 535, 541 (N.D. Ill. 1981) (emphasis added). After all, the level of trading in an account of an investor whose stated objective is speculation and trading is expected to be more frequent than an investor with a more conservative objective, such as preserving principal or seeking fixed income. *See Costello v. Oppenheimer & Co., Inc.*, 711 F.2d 1361, 1369 (7th Cir. 1983) (where "the goals of an investor are aggressive or speculative, as opposed to conservative and circumspect, it is easier to conclude that a given course of trading has not been excessive"); *Hotmar*, 808 F.2d at 1386 (same). Thus, the "starting point" in determining whether trading was excessive "is, of course, delineation of the customer's investment goals, for those objectives significantly illuminate the context in which the trading took place and, indeed, form standards against which the allegations of excessiveness may be measured." *Costello*, 711 F.2d at 1369; *see Hotmar*, 808 F.2d at 1386 ("In churning cases, excessive trading is measured in the light of the investor's objectives."); *Gopez v. Shin*, 736 F. Supp. 51, 58 (D. Del. 1990) ("evidence of excessive trading must be viewed in the context of the investment objectives of the plaintiff and the market conditions that existed in the relevant time period").

The evidence will prove that Willhoft, Williams, and Moore each made his account objectives clear and in writing. Each wanted to speculate and take advantage of Mr. Calabro's ideas about the opportunities borne of the Great Recession (which, as it turns out, were correct for a while and resulted in the objective of short-term profits). The core of Mr. Calabro's strategy – which the evidence will prove was thoroughly explained to Willhoft, Williams, and Moore, and was reviewed and approved by J.P. Turner executives – initially was to "short" certain segments of the market and utilize margin (without any significant interest charge), and later achieve the same benefit by trading in options. Recognizing the risks associated with the strategy, Mr. Calabro confirmed that Willhoft, Williams, and Moore had the appropriate financial wherewithal, that each had the appropriate risk tolerance, and that each was fully apprised of the reasons for each recommended trade.

The evidence will further demonstrate that after learning of Mr. Calabro's strategy, each customer signed multiple documents and agreements stating, and then reiterating, their "investment objectives" consistent with the trades Mr. Calabro recommended. For example, each customer signed a new account form, or an account update, making their account objectives and risk tolerance clear – they all wanted, in the first instance, "speculation" and "trading profits" with an "aggressive" risk tolerance.

If those were the only signed documents, the Division might be able to raise a question concerning each customer's actual investment objective. Here, however, the evidence will prove more. For example, Willhoft, Williams, and Moore each signed an Options Trading Agreement in which each confirmed an understanding that options trading involves "a high degree of risk," that "due to the short term nature of options it is likely that I may be trading such options to a greater degree than with stocks and/or bonds," and that in light of "the risk factors involved in options trading," as well as each of their "investment objectives" and "financial situation," options trading was suitable. Attached to each Options Trading Agreement was an "Options Suitability Questionnaire" in which Willhoft, Williams, and Moore confirmed their account objectives as seeking "speculation" and "growth." Indeed, the understanding reflected in the documents they signed is consistent with reality and the law because "options are by definition short-term investments" and "an account engaged in options trading would necessarily have a higher turnover rate." *Cotter v. Richards (In re Steven F. Richards)*, 1990 WL 1232910, at *5 (Bankr. N.D. Cal. 1990); *see Follansbee v. Davis, Skaggs & Co., Inc.*, 681 F.2d 673, 676 (9th Cir. 1982) ("a trader looking for quick, short-term gains, and taking short-term gains and losses requires frequent trading"); *Smith v. Sade & Co.*, 1982 WL 1341, at *29 (D.D.C. 1982) (given customer's objectives, "which included trading profits," options trading was "not excessive").

The evidence will further prove that Willhoft and Williams each signed Active Account Suitability Questionnaires, in which each reiterated "Investment Objectives" of "Speculation," "Trading Profits," "Short-Term Trading," and "Growth". Attached to each Active Account Suitability Questionnaire was an Active Accounts Suitability Supplement (which each also signed) confirming Willhoft's and Williams' stated objective to engage in active trading. Each was advised and acknowledged, in writing, that active trading "can involve a higher degree of risk, increased costs, and is suitable only for risk tolerant investors," and each recognized that with a "higher degree of activity," the overall commissions "may tend to be greater than a buy and hold strategy" and that their "portfolio value may tend to be more volatile."

The OIP makes no mention of the repeated documents Willhoft, Williams, and Moore signed reflecting their objectives in real time, and instead relies primarily upon a statistical analysis of turnover[2] and break-even ratios. But the law recognizes that neither of these ratios

[2] The Division's assertion that a turnover rate of six is presumptive of excess trading, without reference to the real-time objectives of Willhoft, Williams, and Moore, is incorrect. The six times turn-over rate concept was considered long before today's technology, before 24/7 news, and before the markets experienced swings of hundreds of points for days, among other differences. The turn-over rate requires a close examination of the customer's investment

"necessarily demonstrates churning," particularly where, as here, the investment objectives of the customers and the structure of their accounts were intended to trade actively. *Costello*, 711 F.2d at 1369; *see Newburger, Loeb & Co. v. Gross*, 563 F.2d 1057, 1070 (2d Cir. 1977) ("a greater volume of activity will normally be expected in such an account" where speculation is the objective); *Carras v. Burns*, 516 F.2d 251, 258 (4th Cir. 1975) ("The structure and investment objective of an account must be considered to determine whether trading is excessive."). Indeed, the evidence will demonstrate the reasons typical turnover or break-even analyses have minimal probative value when, as was intended in this case, the customer accounts were clearly intended to trade in options and engage in short sales with the use of margin.

The OIP suggests that Willhoft, Williams, and Moore may have signed the documents declaring their investment objectives and background, without having first read them. Any such assertion is not only false as a matter of fact, but is also is directly contrary to the settled law that "absent a showing of fraud or mental incompetence, a person who signs a contract cannot avoid her obligations under it by showing that she did not read what she signed." *Coleman v. Prudential Bache Sec., Inc.*, 802 F.2d 1350, 1352 (11th Cir. 1986). In other words, the law precludes brokerage customers from disavowing, in hindsight, covenants and representations set forth in account agreements and investment-related documents on the ground that they failed to read them before signing.

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objectives. *See In re Thomson McKinnon*, 191 B.R. 976, 983 (Bankr. S.D.N.Y. 1996) ("turnover ratios in excess of six may still be deemed proper in light of investment objectives"). This is, of course, common sense, as an active trading account will more likely have a higher turnover, but that fact alone would not convert an otherwise active account into a churned account. Moreover, market volatility during the relevant period has a direct impact on the turnover calculation, and the period in question was notorious for wide daily swings in the market.

For example, in *Bull v. Chandler*, 1992 WL 103686 (N.D. Cal. Mar. 12, 1992), the plaintiff asserted securities fraud, claiming that his broker had misrepresented the risks of certain investments. 1992 WL 103686, at *1. In analyzing whether the plaintiff had raised an issue of fact concerning his justifiable reliance, the court emphasized that the documents the broker provided to the plaintiff disclosed the risks involved with the investment at issue. *Id.* at *6. The plaintiff asserted that "he read neither the offering materials nor the documents he signed and relied exclusively on [his broker's] representations." *Id.* at *7 In entering summary judgment due to "a complete absence of justifiable reliance," the court ruled that "a reasonable jury could not but reach the conclusion that plaintiff, without reason or justification, recklessly placed blind faith in [his broker] and stuck his head in the sand, by ignoring the contradictions between the offering materials and [the broker's] representations." *Id.* at *7-*8.

The Eleventh Circuit in *First Union Discount Brokerage Services, Inc. v. Milos*, 997 F.2d 835 (11th Cir. 1993) reached a similar result in affirming summary judgment dismissing certain investors' state-law securities fraud claims. The court rejected the investors' attempt to avoid summary judgment by claiming they had not read margin and option agreements they nevertheless had signed. As the court declared, "[t]he [investors] may derive neither comfort nor legal protection from their willingness to sign the contracts without reading them." 997 F.2d at 846 n.21; *see also Benoay v. E.F. Hutton & Co., Inc.*, 699 F. Supp. 1523, 1529 (S.D. Fla. 1988) (rejecting plaintiff's argument that an arbitration agreement was unenforceable because she was unaware of it: "[a] party who signs an instrument is presumed to know its contents . . . He cannot avoid his obligations thereunder by alleging that he did not read the contract, or that the terms were not explained to him, or that he did not understand the provisions.")

In short, the evidence will prove that the investment activity in Willhoft's, Williams', and Moore's accounts conformed to their stated investment objectives and, as such, the trading in those accounts was not excessive. For this reason alone, the Division's charges against Mr. Calabro fail.

MR. CALABRO DID NOT EXERCISE *DE FACTO* CONTROL

"Control of trading is an essential element of churning." *Carras*, 516 F.2d at 258. It is uncontested that Mr. Calabro did not exercise formal discretion over, or control of, the Willhoft, Williams, and Moore accounts. Rather, each of the accounts was non-discretionary, and it is uncontested that Mr. Calabro was in steady contact with Willhoft, Williams, and Moore throughout the entire period of their accounts to discuss their performance, to propose potential trades, and to receive direction concerning trades. *See Follansbee*, 681 F.2d at 677 ("As long as the customer has the capacity to exercise the final right to say 'yes' or 'no,' the customer controls the account.").

Recognizing the non-discretionary nature of the Willhoft, Williams, and Moore accounts, the Division asserts that Mr. Calabro exercised "*de facto*" control because, the Division alleges, each "relied almost exclusively" on Mr. Calabro "to make investment decisions in their accounts." (OIP¶ 13). But that is not the test for *de facto* control.[3] The "touchstone" of *de facto* control is instead "whether or not the customer has sufficient intelligence and understanding to evaluate the broker's recommendations and to reject one when he thinks it unsuitable." *Follansbee*, 681 F.2d at 677; *see Nunes v Merrill Lynch, Pierce, Fenner & Smith Inc.*, 635 F. Supp. 1391, 1394 (D. Md. 1986). If the test were otherwise, it would "prevent imputing control

[3] Routinely following a broker's recommendations is evidence of control in certain cases, but certainly is never determinative. *Tiernan v. Blyth, Eastman, Dillon & Co.*, 719 F.2d 1, 2 (1st Cir. 1983).

to the highly sophisticated investor who actively monitors his account but typically does not disagree with his broker's recommendations." *Tiernan*, 719 F.2d at 2 (1st Cir. 1983).

The evidence during the hearing will prove that Willhoft, Williams, and Moore each possessed the intelligence and understanding to ensure their continued control over their own accounts. For instance, Willhoft is a graduate of California Polytechnic University with a business degree in marketing and sales. By the time he opened his J.P. Turner accounts with Mr. Calabro, Willhoft had already been in the real estate business, where he built and sold custom homes, and in the automotive sales business, where he traded in used cars. Furthermore, Willhoft boasted during the period of his J.P. Turner account of his "extensive" investment experience. These facts – all of which will prove uncontested – establish that Willhoft had sufficient intelligence and understanding to ensure continued control of his accounts. *See M & B Contracting Corp. v. Dale*, 795 F.2d 531, 534 (6th Cir. 1986) (it was "clear" that customer's management "maintained control over this account" where one was a "sophisticated businessman and a CPA," and the other was "a tremendously successful builder, graduating, as he said, from the 'school of hard knocks'").

By the time Williams opened his J.P. Turner Account, he had an MBA degree and had been a professor at California Polytechnic University for 30 years. At Cal Poly, Williams did not teach a subject in, for example, the arts or music; Williams taught *quantitative analysis* (a technique that seeks to understand behavior by using complex mathematical and statistical modeling, measurement and research), queuing theory, and production management. Williams also already had 30 years of investment experience by the time he met Mr. Calabro, and read the Wall Street Journal regularly. Indeed, Williams is exponentially more sophisticated than the customer held to have retained control of his account in *Follansbee* – a customer with a college degree in economics, a course in accounting, and an investor who read corporate financial reports with understanding and investment advisory literature. 681 F.2d at 677.

While there is, at present, less information produced concerning Moore, one thing is for certain. At the time he opened his account with J.P. Turner, Moore was 45 years old, and was the owner of a metal fabrication and construction business with 35 employees and annual revenues in excess of $8 million. Moore also had 15 years of investment experience. His business and investment experience ensured his continued control of his account. *See M & B Contracting*, 795 F.2d at 534.

The evidence will further prove that Willhoft, Williams, and Moore closely monitored each of their accounts including the commissions charged, maintained an active interest in each of their accounts, frequently spoke to Mr. Calabro concerning the status of their accounts and approved all or most of the transactions in their accounts, received and understood trade confirmations and monthly statements, and understood the nature of their investments. Their intense interest in their accounts, even further, establishes that Willhoft, Williams, and Moore never relinquished control. *See Norniella v. Kidder Peabodv & Co., Inc.*, 752 F. Supp. 624, 629 (S.D.N.Y. 1990) (investors maintained control over account where they monitored and raised questions about the accounts with stockbroker); *Leib v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 461 F. Supp. 951, 954-955 (E.D. Mich. 1978), *aff'd*, 647 F.2d 165 (6th Cir. 1981) ("[I]f the customer and the broker speak frequently with each other regarding the status of the account or the prudence of a particular transaction, the courts usually find that the customer, by maintaining such active interest in the account thereby maintained control over it."); *Xaphes v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 632 F. Supp. 471, 483 (D. Maine 1986) (a "well-educated, sophisticated investor" who "monitored his account constantly and in great detail, checking confirmation slips as they were sent to him, checking the monthly statements, and making notes about the account for himself and his accountants" had "sufficient financial acumen to determine his own best interests").

In sum, the evidence will prove that Mr. Calabro did not assume control of the accounts of Willhoft, Williams, or Moore, *de facto* or otherwise. As such, the Division's charges against Mr. Calabro fail for this separate reason.

MR. CALABRO DID NOT COMMIT FRAUD

In the end, this case is about whether Mr. Calabro committed *fraud* – *i.e.*, whether his purpose was to generate commissions by recommending unwarranted trades without regard for the interest of his customers. *See Thompson*, 709 F.2d at 1416 ("The final element that must be pleaded in order to support a churning claim is that of scienter, that a broker acted with fraudulent intent."); *Cruse v. Equitable Sec. of N.Y. Inc.*, 678 F. Supp. 1023, 1031 (S.D.N.Y. 1987); *M & B Contracting*, 601 F. Supp. at 1111 ("[S]cienter is defined as intent to defraud, or a reckless disregard by the broker of the customer's best interests.").

The evidence will prove that Mr. Calabro's intent was to offer Willhoft, Williams, and Moore a fully-transparent strategy to take advantage of his gloomy view of the markets in 2008 and 2009. The evidence will further prove that Mr. Calabro fully-disclosed the risks of his strategy, fully-disclosed the trades he recommended, and engaged in daily and weekly telephone conversations with Willhoft, Williams, and Moore designed to ensure that they knew of the precise activity in their accounts. Indeed, Mr. Calabro explained his strategy to his superiors; they closely studied it, and recommended and imposed reduced commissions to account for the activity, and approved the strategy as sound and solid. Mr. Calabro was so optimistic that his strategy would be successful, that he engaged in the same trading in his own accounts, and ultimately lost large sums of money when the market turned upwards.

In short, Mr. Calabro was passionate about helping his clients, learned all he could about every investment, and contrary to any form of deceptive conduct, engaged in a trading strategy and account activity that was transparent to each of his customers every day. That is not fraud. *See Hotmar*, 808 F.2d at 1386 (where broker "freely shared all his knowledge and information," the court was unable "to perceive any real evidence of deception on the party" of the broker, notwithstanding the fact that the customer "suffered substantial losses while [the broker] was receiving substantial commissions").

For these separate reasons, the Division's charges against Mr. Calabro fail.

CONCLUSION

For all the foregoing reasons, and as will be proven during the hearing, the Division's charges against Mr. Calabro are without merit, and an Initial Order should be entered in his favor rejecting those charges.

Dated: January 14, 2013

COUSINS CHIPMAN & BROWN, LLP

By:______________________
Adam D. Cole

380 Lexington Avenue
17th Floor
New York, New York 10168
cole@ccbllp.com
Tel: (212) 551-1152
Fax: (302) 295-0199